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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1194

ALICE MARTENS YOUNG, ETC.,
Petitioner,

vs.

CLINTON P. ANDERSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

ROBERT M. RIESER,
JOHN WATTAWA,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1194

ALICE MARTENS YOUNG, TOWN OF MADISON, DANE COUNTY, WISCONSIN, INDIVIDUALLY, AND ALSO ON BEHALF OF HERSELF AND ALL OTHER PERSONS AS A CLASS HOLDING STOCK IN THE MISS-WIS TIMBER AND LAND CO. AT TIME OF ITS DISSOLUTION,

Petitioner,

vs.

CLINTON P. ANDERSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, DEPARTMENT OF AGRICULTURE, THE MALL, BETWEEN 12TH AND 14TH STREETS, S. W., WASHINGTON, D. C.; E. H. WIECKING, LAND USE COORDINATOR, SAID DEPARTMENT OF AGRICULTURE; WILLIAM A. JUMP, DIRECTOR, OFFICE OF BUDGET AND FINANCE, SAID DEPARTMENT OF AGRICULTURE; RAY WARD, DIRECTOR, DIVISION OF PURCHASE, SALES AND TRAFFIC, SAID DEPARTMENT OF AGRICULTURE; JAMES N. CLINE, JR., ACTING CHIEF, GENERAL CONTRACTING SECTION, DIVISION OF PURCHASE, SALES AND TRAFFIC, SAID DEPARTMENT OF AGRICULTURE; L. F. WATTS, CHIEF, FOREST SERVICE, SAID DEPARTMENT OF AGRICULTURE; L. F. KNEIPP, ASSISTANT CHIEF, LANDS DIVISION, FOREST SERVICE, SAID DEPARTMENT OF AGRICULTURE; ROBERT H. SHIELDS, SOLICITOR, SAID DEPARTMENT OF AGRICULTURE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and the Associate Justices:

Alice Martens Young, petitioner, prays for the issuance of a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia,

entered January 6, 1947, in this cause, its number 9292 (R. 80), affirming a judgment of the District Court of the United States for the District of Columbia. The opinion of the Court of Appeals appears in the record herein (R. 76-79), and is not yet reported.

Questions Presented

Is the United States a necessary party when it is alleged, not unsubstantially, that title to the lands involved never passed to the United States, but remained in those for whom petitioner sues, because of the unconstitutionality of the Weeks Act, under which all acquisitions were purported to have been effected?

Alternatively, and assuming Weeks Act constitutionality, is the United States a necessary party in a suit to declare acts of officers of the United States unlawful and to grant incidental relief when it is alleged, and appears, that such officers have failed to observe the legal requirements declared by that Act to be indispensable conditions precedent to permit them to acquire lands in the name of the United States?

Did the Court err in holding that the Mississippi Act (R. 51) conformed to the requirements of the Weeks Act?

Did the Court err in failing to hold the Mississippi Act (R. 51) unconstitutional under the Mississippi Constitution?

Is the Court's ruling in conflict with applicable decisions of this Court?

Statutes Involved

United States Code, Title 16, Section 513 (R. 18), Sections 515-520 (R. 18-22), particularly the following portions of said Sections:

> "The Secretary of Agriculture is authorized and directed to examine, locate, and recommend for pur-

chase such forested, cut-over, or denuded lands within the watersheds of navigable streams as in his judgment may be necessary to the regulation of the flow of navigable streams or for the production of timber, and to report to the National Forest Reservation Commission the results of such examination; but before any lands are purchased by the Commission, said lands shall be examined by the Secretary of Agriculture, in cooperation with the Director of the Geological Survey, and a report made by them to the Commission showing that the control of such lands by the Federal Government will promote or protect the navigation of streams, or by the Secretary of Agriculture showing that such control will promote the production of timber thereon." (Section 515, R. 18, 19)

"The Secretary of Agriculture is authorized to purchase, in the name of the United States, such lands as have been approved for purchase by the National Forest Reservation Commission at the price or prices fixed by said Commission.

"No deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this Section until the Legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States *for the purpose of preserving the navigability of navigable streams* . . ." (Section 516, R. 19)

Section 6058, Mississippi Code, 1930 (R. 51), particularly the following portion thereof:

"The consent of the State of Mississippi is hereby given to the acquisition by the United States by purchase or gift of such land in Mississippi as in the opinion of the Federal Government and the State Forestry Commission may be needed for the establishment of a *national forest or forests or reclamation or colonization projects in this region.*" (R. 51)

(The emphasis supplied in the Statutes above is to enable ready comparison between the requirements of the

Weeks Act for legislative consent by the State of Mississippi, and the nature and extent of the action taken by the Legislature of Mississippi.)

Jurisdiction

This Court has jurisdiction under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Chapter 229, 43 Stat. 936), and by virtue of alleged violation of the United States Constitution, and in conformity with Rule 38 of this Court, Section 5, Sub-paragraphs (b) and (c).

Petitioner's timely petition for rehearing (R. 81-89) was denied by the Court of Appeals January 22, 1947. (R. 89)

Statement of the Case

(a)

For the purpose of a Motion to Dismiss, all of the well pleaded facts appearing in the Complaint are deemed to be true. *Ickes* v. *Virginia-Colorado Development Corporation,* 295 U. S. 639, 55 S. Ct. 888, 79 L. Ed. 1627; *Ickes* v. *Fox,* 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525; *State of Oklahoma* v. *Guy F. Atkinson Co.,* 37 F. Supp. 93, 96, affirmed 313 U. S. 508, 61 S. Ct. 1050, 85 L. Ed. 1487.

(b)

The enactment of the Weeks Act was preceded by examination and inquiry by Congress into the constitutionality of this type of law. (House Committee Report No. 1514, 60th Congress, 1st Session, Resolution No. 365; See Appendix to Brief herewith.) It was this serious doubt as to the constitutionality, and the apprehension of Senators and Representatives concerning the clashing of two sovereignties within a single State, and the possible loss of large tax revenue, that motivated the deliberate in-

clusion of the provision requiring consent by the State legislature "for the purpose of preserving the navigability of navigable streams." (Section 516, Title 16, United States Code; R. 19)

Even with such inclusion, validity was questioned thereafter on the Floor of Congress. (*Congressional Record*, House, Vol. 45, Part 8, 61st Congress, 2d Session, pages 8987, 8989, 8994, 8996, 8997, 9017; *Congressional Record*, Senate, Volume 46, Part 3, 61st Congress, 3rd Session, pages 2578, 2582, 2586, 2587) As late as 1934, Congress reaffirmed the necessity for such legislative consent, by requiring at least substantial compliance in the form of affirmative action by the Legislature or specific acquiescence by the members of the Legislative body. (Act of June 14, 1934—48 Stat. 955, Chapter 511; See Appendix to Brief herewith.) The Legal Department of the State of Mississippi have also expressed doubt as to the validity of the procedure now challenged in this proceeding. (*Official State of Mississippi 1944* Pamphlet "Mississippi Land Purchases by Federal Government—Statement by Gov. Thos. L. Bailey, and Attorney General's Opinion to the Governor"; See Appendix to Brief herewith.)

There has been no controlling decision respecting (a) validity of the Weeks Act, (b) sufficiency of the methods employed herein to conform to this Act, (c) adequacy of the consent accepted by the Secretary of Agriculture, (d) validity of the Mississippi Statute relied upon.

Moreover, the decisions in this Court relied upon by the Court of Appeals (*Morrison* v. *Work*, 266 U. S. 481; *New Mexico* v. *Lane*, 243 U. S. 52; *Louisiana* v. *Garfield*, 211 U. S. 70; *Naganab* v. *Hitchcock*, 202 U. S. 473) do not sustain the conclusions of that Court.

In 1934, the then Secretary of Agriculture, indicated desire to acquire, under the Weeks Act, certain lands in Mississippi owned respectively by petitioner and by Miss-

Wis Timber and Land Co., a corporation dissolved in 1938. (R. 7, 3) In the ensuing discussions, the Secretary's agent advised that unless petitioner and the Company so sold, their lands would be taken through condemnation, and further, that in such acquisitions in that area, all grantors would be treated equally in the matter of mineral rights, in that none would be permitted to reserve the same for longer than ten years. (R. 7) As petitioner and the Company were financially unable to litigate with the United States, they executed options for the lands as requested. (R. 7, 8) Recently it has been learned that certain others whose lands in Mississippi were then also acquired, were granted mineral reservations therein for 30, 50, or 100 years, or even in perpetuity. (R. 7)

In December 1935, and in June and July 1936, following exercise of its option at $3.60 per acre, the Company transmitted deeds for the United States for approximately 14,750 acres in Mississippi, with reservation of mineral interests for ten years from July 1, 1935, the Secretary, in May 1937, obtaining condemnation for about 2,245 more acres of the Company in that State at about $3.60 per acre, with like reservation of mineral interests. (R. 9)

In November 1936, the Secretary obtained further condemnations—one for about 1,117 more acres of petitioner's land in Mississippi at $3.75 per acre, with like reservation of mineral interests, and one for about 378 more acres of her land there at $2.25 per acre, with reservation of mineral interests for ten years from July 1, 1934 (R. 9, 10)

In March, 1938, the Company conveyed its rights in the reserved mineral interests to another, who thereafter conveyed to petitioner (R. 10). Accordingly, she has all interests remaining in the grantors in these mineral rights, and along with the other stockholders at the time of the Company's dissolution, will have full interest in the lands and

timber, or their value, if the deeds and condemnations are adjudged to have failed (R. 10).

All transactions for these acquisitions, including the condemnations, were prosecuted at the instance of the Secretary of Agriculture allegedly under the Weeks Act (R. 10).

By her Complaint filed June 28, 1945 (R. 73), and again by her Amended Complaint filed July 12, 1945, petitioner contended, for the reasons therein indicated (R. 10, 11), that the Weeks Act is unconstitutional and invalid at law; that irrespective thereof, under its Section 516 (R. 11), no deed or other instrument of conveyance can be accepted or approved by the Secretary of Agriculture "until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams"; that the fulfillment of that requirement constitutes a condition precedent to actual passing of title, whether by deed of conveyance or by decree of condemnation, which has never been fulfilled, and that, therefore, title could not, and did not, pass under the deeds of conveyance, or judgments of condemnation, but remained in the Company as to its lands, and in petitioner as to hers (R. 12, 13). On behalf of herself and others in the class, she offered to repay the amounts received from the United States, with interest, and to reimburse for improvements made, less adjustments for any revenues derived or damages due (R. 13, 14).

The deeds, and judgments of condemnation, provide that in default of certain developmental steps by the grantors, the mineral interests shall at the expiration of the indicated periods accrue to the United States (R. 14); and petitioner alleged that on July 1, 1945, or shortly thereafter, defendants, or some of them, acting under the Department's regulations, would effect public bidding for the granting of

leases on such mineral interests, for operation as though Government-owned, and would take other like steps, to the irreparable damage of petitioner and members of the class (R. 14, 15).

Accordingly, petitioner asked that defendants be restrained from exercising any acts of ownership with respect to the lands or interests, including any steps to place the same on lease; and that the Court adjudge that title did not pass under the deeds and judgments, but remained in the grantors, and that it then accord further incidental, related relief (R. 16, 17).

On September 12, 1945, defendants, not having answered, filed Motion to Dismiss the Amended Complaint (R. 53), which, following oral argument (R. 54-70), was granted January 16, 1946 by the District Court (R. 71), on the ground that the suit is an action against the United States without its consent (R. 70). On appeal such dismissal was affirmed (R. 80).

Reasons Relied upon for Allowance of the Writ

I

Respecting petitioner's contention of unconstitutionality of the Weeks Act, the Court of Appeals ruled:

> "Appellant's position as to the unconstitutionality of the Weeks Act would have to be overruled, for appellant's main contention raises a question that has been too long and too thoroughly settled now to justify discussion" (R. 77).

Therefore, the Court of Appeals has decided a question of substance relating to the construction or application of the Constitution, which has not been, but should be, settled by this Court.

II

Irrespective of the question of constitutionality of the Weeks Act, there is the fact that its Section 516 provides that:

> "No deed or other instrument of conveyance shall be accepted or approved under this Section until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams" (R. 19).

The only legislative action purporting to relate here to the foregoing requirement was as follows:

> "The consent of the State of Mississippi is hereby given to the acquisition by the United States by purchase or gift of such land in Mississippi as in the opinion of the federal government and the state forestry commission may be needed for the establishment of a national forest or forests or reclamation or colonization projects in this region" (Section 6058, Mississippi Code, 1930—R. 51).

Petitioner contends that such State Statute was not a compliance with the above requirement of the Weeks Act for title transfer, because (a) such Statute did not convey legislative consent to acquisition by the United States for the purpose of preserving the navigability of navigable streams, (b) it purported to apply, not to individual, currently proposed acquisitions, but in blanket form to all, in advance, for the limited purpose of national forests, reclamation or colonization, commerce not being considered, (c) it did not identify or describe the acreage in question, as required by the term "such land" in the Weeks Act provision, (d) it purported to delegate legislative power to the Federal Government and the State Forestry Commission,

in derogation of the Constitution of Mississippi, which in its Section 33 provides that the "legislative power of the State shall be vested in a legislature, which shall consist of a Senate and a House of Representatives" (R. 12, 13).

The Court of Appeals ruled thereon as follows:

> "The allegation that Mississippi has not given its consent is negatived by the statute of that State which appellant included as part of her complaint. Its terms are even broader than Congress has required, and certainly appellant may not complain of this" (R. 78).

Accordingly, that Court has decided a question of substance relating to a Statute of the United States, which has not been, but should be, settled by this Court.

III

In the District Court and in the Court of Appeals, petitioner relied upon *United States* v. *Lee,* 106 U. S. 196, 27 L. Ed. 171, 1 S. Ct. 240, decided 1882, in which a suit in ejectment was held to lie to restore the possession held by defendants as officers of the United States, title being adjudged not to have passed to the United States in prior tax sale proceedings, but to have remained in the plaintiff.

However, the Court of Appeals ruled, erroneously, it is believed, that "whatever now remains of the doctrine in the *Lee* case has no applicability to the case at hand, for the rule in that case which appellant seeks to apply in this—even on a state of facts more nearly akin to those in the *Lee* case—must, in the light of later decisions of the Supreme Court, be considered as no longer controlling. See *Morrison* v. *Work,* 266 U. S. 481 (1925); *New Mexico* v. *Lane,* 243 U. S. 52 (1917); *Louisiana* v. *Garfield,* 211 U. S. 70 (1908); *Naganab* v. *Hitchcock,* 202 U. S. 473 (1906)" (R. 79).

Accordingly, the Court of Appeals has not given proper effect to an applicable decision of this Court, and has mis-

conceived the effect of the other decisions of this Court cited by it.

Conclusion

WHEREFORE, it is submitted that this petition for allowance of a writ of certiorari should be granted.

ROBERT M. RIESER,
JOHN WATTAWA,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1194

ALICE MARTENS YOUNG, ETC.,

Petitioner,

vs.

CLINTON P. ANDERSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The opinion of the Court of Appeals appears in the record at pages 76-79, and is not yet reported.

The questions presented, Statutes involved, Statements of Jurisdiction, and of the Case, and Reasons Relied Upon, appear in the foregoing petition, and in the interest of brevity are not repeated here.

Specifications of Error

I

It was error for the Court of Appeals to hold that the United States is an indispensable party, and that since it had not consented to be sued, it cannot be made a party,

and that therefore the action was properly dismissed, notwithstanding that such action (a) challenges not unsubstantially the constitutionality of the Act of Congress under which the defendant officers of the United States have proceeded with respect to the lands involved, (b) in the alternative, makes showing not unsubstantially that in purportedly acquiring such lands for the United States, its officers have failed to observe the requirements declared by Congress in that Act to be indispensable to permit them to act in the name of the United States.

II

(a)

It was error for the Court of Appeals to hold in effect that the Mississippi Act (R. 51) conforms to the requirements of the Weeks Act, even assuming the broad constuction which the Court of Appeals gives to the Mississippi Act.

(b)

It was error for the Court of Appeals to hold in effect that such Mississippi Act is a constitutional delegation of authority under the Mississippi Constitution.

III

The Court's decision is in conflict with the prior and controlling decisions of this Court, and erroneously construes and restricts the scope of decisions of this Court which are either not controlling or inapplicable.

ARGUMENT

I

(a)

The United States is not a necessary party when it is alleged, not unsubstantially, that title to the lands never passed to the United States, but remained in those for whom petitioner sues, because of the unconstitutionality of the Weeks Act, under which all acquisitions were purportedly effected.

Under Clause 17, Section 8, Article I of the Constitution, Congress has the power to exercise exclusive legislation over such District as may become the seat of government of the United States "and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings." Although Clause 18 following provides that Congress shall have the power "to make all laws which shall be necessary or proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any Department or officer thereof," it was not contemplated that Congress would use such power to acquire vast areas in the States and to extend Federal Government jurisdiction over them. *Kansas* v. *Colorado,* 206 U. S. 46, 88, 96, 97; 27 S. Ct. 655; 51 L. ed. 956; *Legal Tender Cases,* 12 Wall. 457; 20 L. ed. 287, 309.

Under Amendment 10, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As the Federal Government is one of enumerated powers, Congress cannot grant Federal agencies the

authority to acquire lands in the States for non-governmental purposes; and the exercise by Congress of powers not vested in it by the Constitution is in effect to exercise powers that rest in the States. Moreover, no State can, through its legislature, surrender the powers reserved to the States. *Ashton* v. *Cameron County Water Improvement District No. One,* 298 U. S. 513, 56 S. Ct. 892, 80 L. ed. 1309. Congress and the State legislature are not authorized to consummate treaties for the surrender of a State's reserved powers, to be added to the enumerated powers vested by the Constitution in the United States. *United States* v. *Butler,* 297 U. S. 1, 56 S. Ct. 312, 80 L. ed. 477; *United States* v. *Constantine,* 296 U. S. 287, 80 L. ed. 233, 56 S. Ct. 223.

Under Clause 3, Section 8, Article I of the Constitution, Congress has the power "to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes;" and such power has been found to include the authority to deal with navigable waters in the facilitation of interstate commerce, and to take other measures necessary to promote the use of such waters for the public benefit; but Congress may not arbitrarily destroy or impair the rights of riparian owners by legislation having no real relation to the control of such navigation. *United States* v. *River Rouge Improvement Company, et al,* 269 U. S. 411, 419; 70 L. ed. 339; 46 S. Ct. 144. Certainly Congress cannot provide that the Federal Government may acquire land for the purpose of engaging in the timber or mineral-rights businesses.

As shown in the foregoing Petition, belief, or even conviction, as to unconstitutionality of the Weeks Act prevailed at time of passage among able Members of Congress, and has continued to prevail elsewhere, as shown by the recent formal Opinion of the Mississippi Attorney General (See Appendix hereto). Nevertheless, there has never been any

controlling judicial determination, review not having been sought, as it appears, of *Coggeshall* v. *United States,* 95 F. 2d 986, or of the Distric Court decisions, cited by the Court of Appeals (R. 77).

Accordingly, the question of the constitutionality of the Weeks Act, especially as applied in this case, is of very real substance, and in the circumstances the United States is not a necessary party.

> "• • • If an agent of the Government • • • attempts to act under a void or unconstitutional Act of Congress, he ceases to act in an official capacity, and a suit against him is not a suit against the Government. • • • It follows that the exemption of the Government from suit does not exempt or protect its officials when they are proceeding without authority or under an unconstitutional Act of Congress. Otherwise there would be no constitutional limitations, since there would be no way of testing the constitutionality of the challenged procedure. • • • Since the Act of Congress in question is challenged by the plaintiff as unconstitutional, and the constitutionality of said Act is asserted by the defendants, who are within the jurisdiction of this Court and have been served by proper process, this Court has jurisdiction to entertain the suit and must of necessity determine or pass upon the constitutionality of the Act. The question and manner in which it is presented, rather than the ultimate answer, determine jurisdiction."
>
> *State of Oklahoma* v. *Guy F. Atkinson Co.,* 37 F. Supp. 93, 96 (Three-Judge Federal Court), affirmed 313 U. S. 508, 61 S. Ct. 1050, 85 L. ed. 1487.
>
> See also *Philadelphia Company* v. *Stimson, Secretary of War,* 223 U. S. 605, 32 S. Ct. 340, 56 L. ed. 570, affirming 33 App. D. C. 338; *Ex Parte Young,* 209 U S. 123, 28 S. Ct. 441, 52 L. ed. 714; *Cyclopedia of Federal Procedure,* 2d Edition, 1943 (Callaghan and Company), Vol. 1, pages 142, 143.

I

(b)

Assuming Weeks Act constitutionality, the United States is not a necessary party in a suit to declare acts of officers of the United States unlawful and to grant incidental relief, when it is alleged, not unsubstantially, that such officers have failed to observe the legal requirements declared by that statute to be indispensable to permit them to acquire lands in the name of the United States.

The Weeks Act, in its Section 516 (R. 19), expressly provides that:

> "No deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this Section until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams."

Plainly, this Act of Congress prohibits the acceptance of a deed or other instrument before the legislature of the State in which the land lies can sense that this may be done and is satisfied that the land is acquired for authorized purposes. This specific limitation on the power of the Secretary is emphasized by the legislative history of the Act.

The only Mississippi legislative provision relied upon by the Government as complying with the foregoing requirement is the Act approved November 19, 1928, as follows:

> "The consent of the State of Mississippi is hereby given to the acqui tion by the United States by purchase or gift of such land in Mississippi as in the opinion of the Federal Government and the State Forestry Commission may be needed for the establishment of a national forest or forests or reclamation or colonization projects" (R. 51).

But this Act does not constitute a compliance with the requirement of the Weeks Act because (a) such provision does not convey consent to acquisition by the United States for the purpose of preserving the navigability of navigable streams; (b) it purports to apply, not to individual, currently proposed acquisitions, but in blanket form to all, in advance, for purposes wholly foreign to the express purpose declared by the Weeks Act; (c) it does not identify or describe the acreage in question, as required by the term "such land" in the Weeks Act provision; (d) it purports to delegate legislative power to the Federal Government and the State Forestry Commission, in derogation of the Constitution of Mississippi, which in its Section 33 provides that the "legislative power of the State shall be vested in a legislature which shall consist of a Senate and a House of Representatives."

Therefore, such fundamental condition precedent, created by the Weeks Act, has never been fulfilled.

The doctrine that the United States cannot be sued except where Congress has provided, has no application to officers or agents of the United States who, when claiming to hold possession of property for public purposes, are sued therefor by one claiming to be the owner or entitled to possession and asserting absence of power of such officers or agents to act for the United States. The right or title of the United States may be the subject of judicial inquiry under such circumstances, although the United States has not consented to be a party. *United States* v. *Lee*, 106 U. S. 196, 27 L. ed. 171, 1 S. Ct. 240; *Ickes* v. *Fox*, 300 U. S. 82, 97, 57 S. Ct. 412, 81 L. ed. 525; *Philadelphia Company* v. *Stimson, Secretary of War, supra; State of Oklahoma* v. *Guy F. Atkinson Co., supra; Blondet* v. *Hadley*, 144 F. (2d) 370, (C. C. A. 1st 1944; *Correa* v. *Barbour*, 71 F. (2d) 9, C. A. A. 1st 1934); *Cyclopedia of Federal Procedure, supra*, Vol. I, pages 142, 143, and footnotes 30, 31.

II

Even assuming the broad construction which the Court of Appeals gives to the Mississippi Act (R. 51), the latter did not conform to the requirements of the Weeks Act (R. 19), aside from being an improper attempt at delegation of authority under the Mississippi Constitution.

(a)

After referring generally to the Weeks Act, the Court of Appeals finds:

> "Before acquisition, the Act requires the consent of the legislature of the State wherein the land is located." (R. 76)

But such finding is incomplete, and indicates misconception, as the Act requires not mere consent of the legislature of the State, but—fundamentally and vitally—consent of the legislature "to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams." (R. 19) In the absence of full and exact compliance with such requirement, the Secretary of Agriculture stands prohibited from accepting or approving any deed or other instrument of conveyance in any purported acquisition under the Weeks Act. (R. 19)

The Court further observes (R. 77) that petitioner's second ground for annulment of the transaction is "that consent of the Mississippi Legislature never having been obtained, no title passed nor could pass, constitutionally, to the United States." But petitioner's contention in this connection is not that a consent of a kind was not obtained, but that the Legislature of Mississippi has never consented to the acquisition of the lands in question by the United States for the purpose of preserving the navigability of

navigable streams, as expressly required and mandatory under the Weeks Act. (R. 19)

The Court further states that "the unlawful possession, as appellant claims, is solely that the United States were without constitutional power to take title." (R. 78) But petitioner's contention of unlawful possession is based on the further and alternative fundamental ground that irrespective of the issue of constitutionality of the Weeks Act, and assuming such constitutionality, there has not been a fulfillment of the condition precedent under that Act, indispensable to the acceptance by the Secretary of Agriculture of any deed or other instrument of conveyance, and to the passing of title, namely, consent by the State Legislature to the acquisition of such land by the United States "for the purpose of preserving the navigability of navigable streams." (R. 19) The Weeks Act affirmatively declares that until this kind of consent is given, Congress does not authorize possession or ownership by the United States. (R. 19)

The Court of Appeals concludes:

> "The allegation that Mississippi has not given its consent is negatived by the Statute of that State which appellant includes as a part of her complaint. Its terms are even broader than Congress has required, and certainly appellant may not complain of this." (R. 78)

The consent requirement under the Weeks Act is express and unambiguous, and allows no latitude or discretion as to the character or extent of the legislative consent. The terms of such consent may not be broader or narrower than the actual requirement, thereby indulging individual interpretations and misinterpretations, but must comply precisely with the specific requirement, namely, consent by the legislature to the acquisition of such lands for the

purpose of preserving the navigability of navigable streams.

The consent relied upon by the Government does not mention streams, or navigable streams, or navigability, but is limited to "national forest or forests or reclamation or colonization projects." (R. 51) How can a consent be broader in scope, as asserted by the Court of Appeals, which makes no reference to the declared and exclusive purpose under the Weeks Act, but announces purposes entirely unrelated to, and wholly different from, such single express purpose? A national park may, and generally does, embrace a relatively small and compact area which could not materially affect the taxing power of a State, but such would not be the situation with respect to areas dedicated to the preservation of the navigability of navigable streams. In the case at bar, not only are the purported acquisitions extensive, but much of the area has no possible connection with navigability of navigable streams, which only evidence adduced at trial can fully demonstrate. The fact is inescapable that the fundamental requirement under the Weeks Act, namely, consent by the Legislature to acquisition by the United States "for the purpose of preserving the navigability of navigable streams," has been ignored in this case.

The inadequacies and misconceptions in the Court's Opinion were called to its attention in a Petition for Rehearing (R. 81-89), but the same was denied. (R. 89) The District Court reserved all direct comment on this issue of title failure for default of required legislative consent, which was emphasized in the proceedings before it on the Motion to Dismiss, and accordingly this fundamental issue still remains without clear judicial expression.

Where agents of the United States Government, on its behalf, assert title which under the controlling Statutes is expressly forbidden to that Government except on compliance with certain conditions, the agents, such compliance

having failed, are in the position of exceeding their authority and of asserting rights which in the circumstances cannot and do not exist. The assertion of a right claimed to exist, before there has been a compliance with express statutory requirements enabling it to exist, is as ineffective as if no power had been delegated at all. In requiring full and lawful consent from the State whose sovereign domain the Government seeks to invade and diminish, Congress has thereby denied to the public officials the right to acquire property in such domain; and accordingly the Government never acquired the property rights in Mississippi, and the proposed actions of its agents are illegal.

By Act approved June 14, 1934 (see Appendix hereto), Congress reaffirmed the necessity for State consent, in permitting the same to be given for the limited period thenceforth until January 1, 1935, by written statement of consent signed by the Governor of a State, and containing the certification that a majority of the individual members of the current State Legislature had expressed in writing to the Governor their concurrence in, and approval of, such statement of consent, instead of requiring the consent of the Legislature to be expressed by its formal action while in session.

In other words, a consent slightly less conventional than formal action of the Legislative body while in session was declared acceptable in the exigency indicated for the brief period of a little over six months; and as will be observed, even such less formal consent required a written statement of consent signed by the Governor of a State and containing the broad certification indicated, all being still quite far from a consent purportedly emanating from a State Forestry Commission and the Federal Government, on attempted delegation.

It will be further observed that even such less formal consent had to include the certification of the written concurrence and approval of a majority of the individual members of the *current* Legislature, clearly interdicting action to operate *in futuro,* and that the closing words of the Act advert to a consent to the acquisition of "said land" by the United States, signifying a specific consent to the individual, currently proposed acquisition, not a consent purporting to apply in blanket form to all acquisitions, in advance, and before the extent and implications of the grant can be fully known by the Legislature.

Prior to its enactment, this Act was Senate Bill No. 3521, 73rd Congress, 2nd Session; and the necessity for State legislative consent, and the existence of the express limitation upon the basic authority for purchase embodied in the Weeks Act, are further shown by the Report of the Senate Committee on Agriculture and Forestry (No. 1077, 73rd Congress, 2nd Session, to accompany Senate Bill No. 3521, Calendar Day, May 22, 1934).

(b)

Under Section 33 of the Constitution of Mississippi, the "legislative power of the State shall be vested in a legislature which shall consist of a Senate and House of Representatives". Accordingly, the above Mississippi Act (R. 51) improperly sought to delegate legislative power to the Federal Government and the State Forestry Commission.

III

This Court's Decision in United States v. Lee Is Applicable

Petitioner relied below upon *United States* v. *Lee,* 106 U. S. 196, 27 L. Ed. 171, 1 S. Ct. 240, decided 1882. There, the property had been occupied and possessed for more

than ten years by the United States, through the officers and agents charged with its control for public uses. Plaintiff, claiming title under a will, sued defendants as such officers and agents, in ejectment, to recover possession. The title relied upon by them was a tax-sale certificate issued by Commissioners appointed by Congress, the land having been bid in for the United States at such sale; and defendants contended that as the United States could not be lawfully sued without its consent, "no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents for the Government". On trial, it was found that the title relied upon by the defendants was defective, because of the Commissioners' refusal to permit the owner to pay taxes, when due, otherwise than in person. However, defendants urged that as the property was being devoted to public uses, those so using it under the authority of the United States should not be sued for its possession, even by one able to prove title.

In a comprehensive Opinion, this Court held that the Circuit Court was competent to decide the issues, with the parties before it.

In holding such decision inapplicable at bar, the Court of Appeals states (R. 78, 79):

> ". . . That the facts in that case and this are vitally different is convincingly apparent, for it is obvious that in no sense can the United States or their officers be described as trespassers in the present case. Here, the United States are in possession as holders of the record title through the voluntary acts of appellant and the corporation. The unlawful possession, as appellant claims, is solely that the United States were without constitutional power to take title. But appellant has no greater right to challenge the transaction on that ground than a stranger. She relinquished her rights

ten years ago. *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 479 (1938) But we think we need not rely on that principle, nor stop to weigh the factual differences between the Lee case and this, since we also think it is perfectly clear that whatever now remains of the doctrine in the Lee case has no applicability to the case at hand, for the rule in that case which appellant seeks to apply in this—even on a state of facts more nearly akin in the Lee case—must, in the light of later decisions of the Supreme Court, be considered as no longer controlling. See *Morrison* v. *Work,* 266 U. S. 481 (1925); *New Mexico* v. *Lane,* 243 U. S. 52 (1917); *Louisiana* v. *Garfield,* 211 U. S. 70 (1908); *Naganab* v. *Hitchcock,* 202 U. S. 473 (1906)."

In the *Lee* case, title in the United States was claimed, as stated, upon a certificate following a tax sale at which the land was bid in for the United States. Here, title in the United States is claimed following proceedings under an Act of Congress which is unconstitutional, or if constitutional, without compliance with the express requirement in that Act, without which title to the United States stands interdicted (R. 19). Accordingly, the United States or its officers can be also described as trespassers here. Nor is the United States in possession as holder of record title through the voluntary acts of petitioner and the corporation, because it was the Secretary of Agriculture, who, through his agent, announced the desire to acquire these lands for the United States. In addition he threatened petitioner and the corporation, who were unable to litigate with the United States, that unless they so agreed to sell, their lands would be taken through condemnation, simultaneously, however, assuring them that in acquisitions in that area, all former owners would be treated equally in mineral rights reservations (R. 7). However, petitioner and the Company received reservations for only 10 years, while it is now revealed that other corporations and individuals in

Mississippi received reservations for 30, 50, or 100 years, or even in perpetuity (R. 7).

Nor, as appears hereinabove, does petitioner claim unlawful possession solely because the United States was without constitutional power to take title. Even assuming Weeks Act constitutionality, there is title failure, with resulting unlawful possession, for default of the required legislative consent (R. 19).

The Court asserts (R. 78) that petitioner has no greater right than a stranger to challenge on the ground that the United States was without constitutional power to take title, and that "she relinquished her rights ten years ago". However, the assertions of the Court beg the very question which the Court must decide before the Petitioner can be said to be a stranger, or to have relinquished her rights, namely, that the Act of Congress under which the acquisitions were purportedly effected, is unconstitutional, or, if it is constitutional, that the defendants have failed to observe its express conditions, which alone could give them the power to acquire title for the United States.

Morrison v. *Work,* 266 U. S. 481, 45 S. Ct. 149, 69 L. Ed. 394, cited by the Court of Appeals (R. 79), appears inapplicable. There, the lands ceded were the property of the United States, and it had "confessedly, power to dispose of them" (487), with right in the Indians "merely to have the United States administer properly the trust assumed" (488). That suit concerned management and disposition of the lands under the agreement of cession, the lands being admittedly regularly acquired. This Court observed (486) that such suit was "unlike those in which relief by injunction has been granted against the head of an executive department or other officer of the Government to enjoin an official act on the ground that it was not within the authority conferred, or that it was an improper exercise of such

authority, or that Congress lacked the power to confer the authority exercised".

In *New Mexico* v. *Lane,* 243 U. S. 52, 37 S. Ct. 348, 61 L. ed. 588, also so cited (R. 79), the object was to take land from the United States, which admittedly had title, the principal question arising whether the School Land Grant Act of June 21, 1898, "had the quality as a grant of the land, asserted of it" (58), the situation at bar being quite different.

Louisiana v. *Garfield,* 211 U. S. 70, 29 S. Ct. 31, 53 L. ed. 92, also so cited (R. 79) deals solely with naked title, and does not parallel the case at bar. The contention of the United States on demurrer that title never passed *from the United States* appears to be correct in the absence of resolution of the doubt whether Louisiana had not secured a good title by a lapse of five years since the approval, and by operation, of the Act of March 3, 1891. Accordingly, the United States had there a direct legal interest. In the case at bar, however, it is contended, and believed shown, that the title never passed *to the United States,* and that, therefore, it has no legal interest. In *Louisiana* v. *Garfield,* this Court stated (211 U. S. 75) that "we will assume for purposes of decision that if the United States clearly had no title to the land in controversy, we should have jurisdiction to entertain this suit." Questions of fact appear in *Louisiana* v. *Garfield,* so declared by this Court, while in the case at bar all of petitioner's well-pleaded facts stand admitted for the purpose of the Motion to Dismiss.

In *Naganab* v. *Hitchcock,* 202 U. S. 473, 26 S. Ct. 667, 50 L. ed. 1113, also so cited (R. 79) the legal title to all the tracts of lands in question was still in the Government, as this Court observed (202 U. S. 473), while in the case at bar the United States never legally acquired title.

Conclusion

Wherefore, it is submitted that the Petition for Certiorari should be granted.

ROBERT M. RIESER,
One West Main Street,
Madison, Wisconsin,
JOHN WATTAWA,
1317 F Street Northwest,
Washington, D. C.,
Counsel for Petitioner.

APPENDIX

I

Early House Judiciary Committee Expression of Unconstitutionality of Acquisitions for Purposes Unrelated to Navigability of Navigable Streams

"60th Congress 1st Session House of Representatives
Resolution No. 365

(Report No. 1514)

In the House of Representatives

April 20 (Calendar Day, April 24), 1908—Referred to the House Calendar and ordered to be printed. Mr. Jenkins, from the Committee on the Judiciary, reported the following Resolution:

"Resolved, That the Committee is of the opinion that the Federal Government has no power to acquire lands within a State solely for forest reserves, but under its constitutional power over navigation, the Federal Government may appropriate for the purchase of lands and forest reserves in a State, provided it is made clearly to appear that such lands and forest reserves have a direct and substantial connection with the conservation and improvement of the navigability of a river actually navigable in whole or in part, and that any appropriation made therefor is limited to that purpose.

Resolved, That the bills referred to in the resolutions of the House (H. R. 10456 and H. R. 10457) are not confined to such last-mentioned purpose, and are therefore unconstitutional."

II

Act of June 14, 1934

(48 Stat. 955,Ch. 511)

AN ACT

To facilitate purchase of forest lands under the Act approved March 1, 1911.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

That to allow and facilitate the purchase of forest lands under the provisions of the Act approved March 1, 1911 (36 Stat. 961, U. S. C., Title 16, Secs. 513-521), in States which desire that such purchases shall be made but cannot give their formal consent thereto until the next meeting of their legislative bodies, it is hereby provided that a written statement of consent signed by the Governor of the State prior to January 1, 1935, and containing the certification that a majority of the individual members of the current state legislative body have expressed in writing to the Governor their concurrence and approval of such statement of consent, shall be regarded as fully complying with and satisfying the requirements of that part of section 7 of said Act of March 1, 1911, which provides that no deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under said Act until the legislature of the State in which the land lies shall have consented to the acquisition of said land by the United States.

Approved June 14, 1934.

III

Excerpts from Official STATE OF MISSISSIPPI PAMPHLET, 1944 —"Mississippi Land Purchases by Federal Government —Statement by Gov. Thos. L. Bailey and Attorney General's Opinion to the Governor."

STATE OF MISSISSIPPI
Department of Justice
Jackson, 103

Greek L. Rice, Attorney General

October 5, 1944.

Governor Thomas L. Bailey,
Chairman, State Forestry Commission,
Jackson, Mississippi.

DEAR GOVERNOR BAILEY:

"The acquisition by the Federal Government and its agencies of the natural resources of this State is assuming such magnitude as to demand our serious attention . . . The danger in the movement on the part of the United States is in the circumstance that the acquisition is attended by no reservation under which it may be reacquired by the State; the Government claims to have fee simple title, the right to hold the land in perpetuity; the power of the State to control and to preserve its domain is gone to the extent that its immovable property is taken over by the United States as a sovereign. . . . A State cannot survive without a domain. The land area is limited. It will never be any larger. . . . Our Constitution nowhere gives authority to the legislature to consent to the transfer to another sovereign of any portion of the territory within our boundaries. . . . No power is vested in the legislature to surrender or to authorize the surrender of any portion of our domain to the Federal Government or to any other government. Such transfers not only involve a loss of a portion of the wealth of the State but also a partial surrender of the State's jurisdiction over its own territory. . . . The legislature has not the power to convert itself into an agency through which the State may surrender its power

and its wealth. The legislature is not the State; it is only part of the machinery set up to manage the State's affairs. It has no authority to liquidate the State in whole or in part. Agents appointed to conduct a business do not have power to dispose of it. . . . The preservation of the integrity of the States is necessary to the preservation of the Union. Both are intended to be indestructible. . . . The arresting features of the activities of the Federal Government in acquiring our timber lands is that the changes that are thus brought about are permanent in character; involved a reduction of the State's natural wealth; effect a 'defalcation' from the State's power and sovereignty. . . . The Government takes over the land without making any provisions for tax burdens already put upon the land in a legal way . . . it nullifies the lien on the faith of which securities were sold and in addition takes over the land itself and removes it beyond the reach of State taxation. . . . The control by the United States of large areas of our lands adaptable to the growth of timber may create some benefits to the people of the United States but no benefits of such value as to compensate for the loss to the State of Mississippi and its citizens of our natural wealth. . . . But in addition to two or three hundred thousand acres taken over by the Government for other purposes, it has taken transfers to approximately 1,000,000 acres of land for timber-growing purposes. And my information is that there are plans being formulated under which, if they are adopted and executed, the Government will acquire some 3,000,000 more acres of land for timber-growing purposes. So it appears that if the program is carried out, within a short time, possibly within five years, the Federal Government and its agencies will own lands outright and a part of the mineral deposits in other lands in this State in an aggregate acreage in excess of one-fifth of our entire domain. Chapter 54 of the Laws of Mississippi of 1928, Code Section 4156, purports to give the consent of the State to the acquisition by the United States of lands its representatives may desire to take over where the State Forestry Commission concurs with the National Forest Reservation Commission in the opinion that the land in question is

needed for national forest purposes. . . . I do not deem it necessary to enter here upon an elaboration of the reasons supporting my opinion that the said Act of 1928 is void. It is enough to say that the legislature undertook to vest in the State Forestry Commission far-extending authority of a kind which the Constitution has not expressly or by implication reported in the legislature itself. . . . If the legislature is given no authority to cede Perry County to the United States, it cannot authorize the transfer of the timber lands therein to the United States for timber-growing purposes; and if this cannot be done by a special act of the legislature, it cannot be done by a general act to be applied to special instances by the State Forestry Commission as it sees fit. . . . It is my purpose to question the validity of the transfers that the Secretary of Agriculture has taken to lands in the State for the purpose of growing timber, that is, for inclusion in national forests. Whether the challenge will be made through court proceedings or the matter will be pursued through negotiation and appeals to the legislature and the Congress, I have not determined. But the said instruments of conveyance are of doubted validity and I consider it to be my official duty to bring the issue to a test in the name of the State of Mississippi. . . . The Federal Government as a matter of equity would be entitled to a return of the amount invested in the lands. . . . I respectfully suggest the advisability of the State Forestry Commission refraining from approving in any form any further acquisitions by the Secretary of Agriculture of lands for timber-growing purposes and from further cooperation with the representatives of the Secretary of Agriculture looking to such acquisitions; and that the Commission withdraw any approvals heretofore given . . . in whatever form . . .

GREEK L. RICE,
Attorney General."

STATE OF MISSISSIPPI

Executive Department
Jackson

Thomas L. Bailey, Governor.

Jackson, Mississippi,
November 29, 1944.

To the Members of the Mississippi Legislature.

GENTLEMEN:

"Some months ago my attention was called to the situation created by the transfers to the United States of large areas of timber lands in this State and to the fact that plans for future acquisitions may be in the offing. Later I requested Attorney General Rice to write me as Chairman of the State Forestry Commission, a letter of advice or an opinion as to the source of the power the Federal Government relies upon in acquiring our lands and as to the regularity and legal validity of the procedure in acquiring titles. . . . This opinion of the Attorney General was submitted to the State Forestry Commission at its meeting held on the 12th day of October last, and that body adopted resolutions committing itself to co-operate no further with the representatives of the Federal Government in their enterprise of taking over lands in this State for timber-growing purposes. I think it is your duty and mine to protect and conserve and perpetuate the wealth in the lands within our boundaries; and that we owe this duty not only to the people of our State but to the people of all the states. . . . You and I, vested with authority and charged with responsibility, would not find it easy to justify a calm acceptance by us of any program to effect the transfer to another sovereign of a substantial portion of the State's domain . . ."

THOMAS L. BAILEY,
Governor.